Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

JAMES A. WATSON, PAMELA D. SEAY, ANTHONY A. WILLIAMS, DONALD L. PENNINGTON, BARRY EATON, CHRIS M. NECHODOM, LUTHER G. ROWLAND, III, CHARLES A. STREAT, KARVIN T. RODGERS, FRANK MORALES, DOUGLAS P. ACRES, CORNELL J. JEFFERSON, and CLIFTON E. CARNEY,

Petitioners,

v.

DEPARTMENT OF THE NAVY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Merit Systems Protection Board follow the statutory test for LEO status which hinges on a determination of the primary duties of the employee's position as set forth in 5 U.S.C. § 8401(17)(a)?

2. Did the Merit Systems Protection Board erroneously use as a critical and controlling factor for the board in determining LEO status the "creation" of the position and not its "existence" as the regulation provides?

3. Is the reason for the creation of the position twenty or more years earlier the same as the reason for its existence today?

4. Did the Merit Systems Protection Board erroneously reformulate the definition of primary duties by taking only one element of OPM's regulatory test and then misinterpreting the single part by substituting the erroneous concept of "creation" in the place of the word "existence"?

James A. Watson, Pamela D. Seay, Anthony A. Williams, Donald L. Pennington, Barry Eaton, Chris M. Nechodom, Luther G. Rowland, III, Charles A. Streat, Karvin T. Rodgers, Frank Morales, Douglas P. Acres, Cornell J. Jefferson and Clifton E. Carney hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

In *Watson, et al. v. Department of the Navy*, the Court of appeals's decision affirming the Merit Systems Protection Board was entered on August 17, 2001 and is reported at Fed. Cir. No. 00-3387 (08/17/01). The court of appeals's decision is appended hereto as Appendix A.

These cases arose in the Federal Circuit on petition for review of a final decision of the Merit Systems Protection Board. The Board's decision in *Watson* is reported at 86 MSPR 718 (2000) (Appendix B).

STATEMENT OF JURISDICTION

This case arises on petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit. The court below affirmed the Merit Systems Protection Board's decisions sustaining the Department of the Navy's determinations that petitioners were not law enforcement officers and therefore were not entitled to enhanced retirement benefits under 5 U.S.C. §§ 8336(c) and 8412(d). This petition is filed within the time allowed by law. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 5, United States Code, Section 8331(20) provides:

> "[L]aw enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

Title 5, United States Code, Section 8401(17) provides:

> [T]he term "law enforcement officer" means —
>
> (A) an employee, the duties of whose position —
>
> (i) are primarily —
>
> (I) the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States; or
>
> (II) the protection of officials of the United States against threats to personal safety; and
>
> (ii) are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director considering the recommendations of the employing agency.

STATEMENT OF THE FACTS

The petitioners are police officers at the Norfolk Naval Base in Norfolk, Virginia. The duties they perform as police officers are primarily the investigation, apprehension and detention of criminals and criminal suspects. The police officers meet the statutory definition of law enforcement officers.

REASONS FOR GRANTING THE WRIT

In establishing the legal standard by which this case and all other LEO cases across the nation will be adjudicated, it is critical to insure the approach is the correct one. The decision of the United States Court of Appeals for the Federal Circuit affirmed the decision of the Merit Systems Protection Board which by all accounts was the incorrect legal test. As the majority determined, the Board's opinion "incorrectly states the law." Appendix A at 14a. As Senior Circuit Judge Friedman points out, the "critical and only controlling factor for the Board in determining LEO status was the reason for the 'creation' of the position and not its 'existence', as the regulation provides." *Id.* (Friedman dissenting in part, Appendix A at 25a). Judge Friedman's finding that the critical and controlling factor in the Board's opinion is well supported. In prior decisions, that did not rely on the Board's creation test, police officers were found to be entitled to LEO coverage. *Bremby v. Department of the Navy*, 81 MSPR 450 (1999); *Hamilton v. Department of the Navy*, 85 MSPR 409 (2000). It is also significant that the Administrative Judge who actually heard the case made numerous factual determinations, consistent with prior Board decisions, which lead him to conclude the police officers performed LEO work. Therefore, the only difference in this case and the Board's prior cases finding officers at the same location, performing the same duties, under the same position description were entitled to LEO was the new test applied by the Board.

A significant part of the Board's error, affirmed by the Court, is that it used an OPM classification standard as evidence of the reason for the creation of the position. The classification standard explains the broad range of duties which could potentially be worked by the police officer whereas the position description describes those duties actually worked. The broad OPM classification standard used in this case, GS-083, includes both LEO and non-LEO work and sheds no light on the reason why the position was originally created or even why it exists today. While the use of an OPM classification standard cannot be ruled out as having some potential to assist in determining entitlement to LEO coverage, the GS-083 standard is useless in this case where the standard includes both LEO and non-LEO work. The critical starting point here would be the position description which describes the actual duties being performed by the police officers which fall within the broader classification standard and which directly state where within the broad GS-083 classification these police officers' duties lie.

The ultimate test in determining LEO duties is a determination of the primary duties of the position. The Board did not apply the test properly. As Judge Friedman concluded:

> The portion of that definition here involved — duties that "constitute the basic reasons for the existence of the position" — is unambiguous. In applying the LEO statute, the Board's responsibility was to apply that definition to the facts of the case, not to reformulate the definition by substituting the concept of the reasons for "creation" of the opinion for the reasons for its "existence."

Watson, Friedman, dissenting in part, Appendix A at 25a.

In view of the Board's clear misstatement of the law affirmed by the majority of the United States Court of Appeals for the Federal Circuit the standard by which all other LEO cases will be reviewed is incorrect.

CONCLUSION

In *Watson* the United States Court of Appeals for the Federal Circuit affirmed the Board's redefined LEO test and put an unwarranted and improper emphasis on a misstatement of a portion of one part of the three-prong test. The Board's reformulation of the regulatory definition to include as part of the test the reason the position was created is clear error.

This case affects hundreds of law enforcement officers across the United States and requires the proper standard be established and applied. The "position oriented approach" which relies on the reason for the creation of the position and an irrelevant classification standard is not the correct approach.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED AUGUST 17, 2001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

00-3387

JAMES A. WATSON, PAMELA D. SEAY, ANTHONY A. WILLIAMS, DONALD L. PENNINGTON, BARRY EATON, CHRIS M. NECHODOM, LUTHER G. ROWLAND, III, CHARLES A. STREAT, KARVIN T. RODGERS, FRANK MORALES, DOUGLAS P. ACRES, CORNELL J. JEFFERSON and CLIFTON E. CARNEY,

Petitioners,

v.

DEPARTMENT OF THE NAVY,

Respondent.

DECIDED: August 17, 2001

Before MICHEL, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and CLEVENGER, *Circuit Judge*.

Opinion for the court filed by *Circuit Judge* MICHEL. Dissenting opinion filed by *Senior Circuit Judge* FRIEDMAN.

Appendix A

MICHEL, *Circuit Judge*.

James A. Watson *et al.* petition for review of the July 17, 2000 final decision of the Merit Systems Protection Board ("Board"), sustaining the Department of the Navy's ("Navy" or "agency") determination that petitioners did not satisfy the statutory and regulatory criteria for early retirement coverage as law enforcement officers ("LEO") under the Civil Service Retirement System ("CSRS"), 5 U.S.C. § 8336(c) (1994), or the Federal Employees' Retirement System ("FERS"), 5 U.S.C. § 8412(d) (1994). *Watson v. Dep't of the Navy*, 86 M.S.P.R. 318 (2000). The petitioners are thirteen current or former police officers employed by the Navy at the Norfolk Naval Base in Norfolk, Virginia. In upholding the Navy's denial of the officers' applications for LEO retirement credit, the Board employed a new approach that more affirmatively considered the reasons for the creation and existence of the positions than it had used in its prior LEO decisions, which emphasized the officers' actual, even if incidental or occasional, duties. *Id.* at 321. In this case, after reviewing the Office of Personnel Management ("OPM") classification standards for the GS-083 Occupation Series to which the officers belonged, a December 1997 "Grade Evaluation Guide for Police and Security Guard Positions GS-0083/GS-0085" ("the Guide") published by OPM, the Position Description for the officers' positions, and the duties actually performed by the officers on a regular and recurring basis, the Board concluded that the officers' positions did not exist primarily for the purpose of investigating, apprehending, or detaining individuals suspected or convicted of federal offenses. *Id.* at 328; *see also* 5 U.S.C. §§ 8331(20), 8401(17) (1994). We hold

that the approach used by the Board is consistent with the statutes and regulations of the LEO retirement coverage program, and that it does not conflict with our decision in *Bingaman v. Department of the Treasury*, 127 F.3d 1431 (Fed. Cir. 1997), or with its own decision in the same case. We also hold that under this approach, the Board's determination that these Norfolk Naval Base police officers did not satisfy the definition of a LEO was free of legal error and supported by at least substantial evidence. Therefore, we affirm.

Background

Congress established a special retirement system in order for federal employees in certain positions to retire at an unusually early age. Either of two statutes governs entitlement to such special retirement coverage. Under both the CSRS and FERS, an employee who qualifies for LEO retirement credit is eligible to retire upon attaining the age of 50 and after completing 20 years of eligible LEO service. *See* 5 U.S.C. §§ 8336(c), 8412(d)(2). Additionally, under the FERS, a LEO can retire at any age after completing 25 years of service. 5 U.S.C. § 8412(d)(1). This is far earlier than the age at which most civil service employees are eligible to retire, and is based on shorter service. 5 U.S.C. § 8336(c) (1994). An employee qualifying for LEO retirement receives a larger annuity than ordinary civil service employees, but is subject to larger salary deductions during his or her employment. A LEO may also be subject to mandatory early retirement. *See* 5 U.S.C. §§ 8335, 8425 (1994). An employee can qualify for LEO retirement credit either by serving in a position that has been approved as such, or by applying for LEO credit and satisfying the employing agency that he or

she is entitled to LEO retirement credit because his or her actual duties primarily involve pursuing or detaining criminals. *See* 5 C.F.R. §§ 831.903-.906, 831.910(a), 842.803-804, 842.807(a) (1994).

The CSRS and the FERS prescribe somewhat different standards for determining whether an employee may be eligible for LEO retirement credit. In order to be eligible under the CSRS, the duties of the employee's position must be "primarily the investigation, apprehension, or detention of individuals suspected or convicted of [federal] offenses." 5 U.S.C. §§ 8331(20), 8401(17)(A)(ii). The standard for LEO eligibility under the FERS adds the further requirement that the duties of the position be "sufficiently rigorous that employment opportunities are required to be limited to young and physically vigorous individuals." 5 U.S.C. § 8401(17).

All petitioners, with the exception of Mr. Rowland, were assigned to the patrol division; Mr. Rowland was assigned to the traffic division. The parties had stipulated that the officers were authorized to carry firearms, had arrest authority, were required to maintain a level of physical fitness by passing an annual physical fitness test if hired after March 1991, had interrogated witnesses and suspects, and had given *Miranda* warnings, and in the case of military suspects, warnings under Article 31 of the Uniform Code of Military Justice.

The Navy denied the officers LEO early retirement credit. The officers filed two separate appeals to the Board, since two of the officers were covered under the CSRS, and the remaining eleven officers were covered under the FERS. On

Appendix A

July 12-16, and August 2-3, 1999, the Administrative Judge ("AJ") conducted a consolidated hearing. In initial decisions dated September 3 and 17, 1999, the AJ reversed the final decision of the Navy, and held that the officers were entitled to LEO retirement credit. *See Watson v. Dep't of the Navy*, DC-0842-99-0483-I-1 (Sept. 3, 1999) (discussing FERS); *Jefferson v. Dep't of the Navy*, DC-0831-99-0482-I-1 (Sept. 17, 1999) (discussing CSRS). The full Board consolidated the *Watson* and *Jefferson* appeals, and granted the agency's petition for review.

On July 17, 2000, the Board reversed the AJ's initial decisions, and held that the officers were not entitled to LEO retirement credit. The Board noted that in its prior cases, it had placed too much emphasis on the duties performed by a particular applicant over a limited period of time, with too little emphasis on the purpose of the applicant's position. *Watson*, 86 M.S.P.R. at 320-21. Using that approach, the Board previously held that Norfolk Naval Base police officers in the same series as petitioners here (the 083 series) were entitled to LEO retirement credit. *Id.* (citing *Bremby v. Dep't of Navy*, 81 M.S.P.R. 450 (1999); *Hamilton v. Dep't of Defense*, 85 M.S.P.R. 409 (2000)).[1] In order to be more faithful to the language of the statutes and the regulations,

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1. The Board also notes that in others cases involving police officers in the GS-083 series, it did *not* hold that the GS-083 police officers were entitled to LEO credit. *Watson*, 86 M.S.P.R. at 323 n.3 (noting that appeals at different times, in different legal postures, and with different evidentiary records . . . "to potentially inconsistent results"); *see also Fitzgerald v. Dep't of Defense*, 80 M.S.P.R. 1 (1998), *aff'd*, 230 F.3d 1373 (Fed. Cir. 1999) (holding that officers in the GS-083 series were not entitled to LEO credit).

the Board expressly adopted a new "position-oriented approach" that would "more affirmatively" assess the "basic reasons for the existence of the position," as required by OPM regulations, 5 C.F.R. §§ 831.902, 842.802 (1994).[2] *Id.* at 321. Under this new approach, the Board stated that "if the position was not created for the purpose of investigation, apprehension, or detention, then the incumbents of the position would not be entitled to LEO credit." *Id.* In determining the reasons for the existence of the position, the Board considered all available evidence, including OPM classification standards, the OPM Guide, the Position Description, and the duties actually performed by the officers on a near daily basis. *Id.* at 328. After reviewing that evidence, the Board concluded that the petitioners' positions did not exist primarily for the purpose of investigating, apprehending, or detaining those suspected or convicted of federal offenses. *Id.* On the contrary, it held that the officers' primary duties were maintaining law and order, protecting life and property, and guarding against potential violations of law. *Id.* at 329. It therefore sustained the agency's decision that the officers were not entitled to LEO credit. *Id.*

The police officers filed a timely petition for review to this court under 5 U.S.C. § 7703 (1994). On appeal, petitioners and amicus, the Fraternal Order of Police, argue that the Board's approach represents a "sweeping policy change" that reverses the approach previously adopted by this court in *Bingaman* in analyzing LEO retirement coverage cases, and that is contrary to the statutes and the regulations

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2. Section 831.902 applies to CSRS determinations; section 842.802 applies to FERS determinations. Both regulations are worded identically.

governing LEO eligibility. We heard oral argument on June 6, 2001, and have jurisdiction under 28 U.S.C. § 1295(a)(9) (1994).

Analysis

A. Requirements for LEO Retirement Credit

Federal police officers are only eligible for early retirement credit under the CSRS or FERS if they meet the statutory definition of a LEO. Both statutes define an LEO as one who holds a position, the "primary duties" of which involve the "investigation, apprehension, or detention" of those suspected or convicted of federal offenses. 5 U.S.C. §§ 8331(20), 8401(17). By regulation, OPM has defined "primary duties" in a three-part test. "Primary duties" are those duties that:

i. Are paramount in influence or weight, that is *constitute the basic reasons for the existence of the position*;

ii. Occupy a substantial portion of the individual's working time over a typical work cycle; *and*

iii. Are assigned on a regular and recurring basis.

5 C.F.R. §§ 831.902, 842.802 (emphasis added). In general, if an employee spends at least fifty percent of his or her time performing certain duties, those duties are his or her primary duties. *Id.* Under the regulations, "[d]uties that are of an

emergency, incidental, or temporary nature cannot be considered 'primary' even if they meet the substantial portion of time criterion." *Id.* Further, the regulations state that the definition of a LEO "does *not* include an employee whose primary duties involve maintaining order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than those who are suspected or convicted of offenses against the criminal laws of the United States." *Id.* (emphasis added). The police officers seeking LEO retirement coverage bear the burden of proving entitlement by preponderant evidence. 5 C.F.R. § 1201.56(a)(2). Eligibility for LEO retirement coverage must be "strictly construed," because the LEO retirement program is " 'more costly to the government than more traditional retirement plans and often results in the retirement of important people at a time when they would otherwise have continued to work for a number of years.' " *Bingaman*, 127 F.3d at 1435 (quoting *Morgan v. Office of Pers. Mgmt.*, 773 F.2d 282, 286-87 (Fed. Cir. 1985)).

B. The Board's Approach

Petitioners and amicus argue that the approach used by the Board places too much reliance on the reason why the position was initially created. In its prior cases, petitioners note, the Board and this court in *Bingaman* had undertaken a fact-specific inquiry into the daily or frequent duties actually performed by the officer seeking LEO coverage, even if those duties were not listed in the Position Description as primary duties. Petitioners argue that the new "position-oriented" approach relies excessively on broad and unclear OPM classification standards and the Position Description in order

to determine why the position was originally created many years ago, without sufficient examination of the regular duties actually performed by the particular employee. This approach, petitioners contend, is contrary to the plain language of the statutes creating the LEO retirement program, and conflicts with our decision in *Bingaman*.

The government argues that the approach used by the Board is permissible, and is more faithful to the statutes and the regulations than its earlier approach. As noted by the Board in this case, the approach formerly used by the Board in cases such as *Bremby* permitted an employee to be deemed eligible for LEO retirement credit so long as he or she could show that to some unspecified degree his or her primary duties "involve" the investigation, apprehension, or detention of those suspected or convicted of federal offenses, even if the employee's primary duties consist of non-LEO duties, such as maintaining law and order or protecting life and property. The *Bremby* approach, the government argues, ignored the first criterion of 5 C.F.R. §§ 831.902, 842.802, which defined the term "primary duties" to require an assessment of the "basic reasons for the existence of the position." 5 C.F.R §§ 831.902, 842.802.

1. Consistency with Statutes and Regulations

We hold that the approach used by the Board in this case is indeed consistent with the statutory and regulatory criteria for LEO retirement credit. The express language of the regulations promulgated under the CSRS and FERS statutes provides support for considering the reason for the position's "existence" as part of the LEO-eligibility analysis. A LEO is

defined in both the CSRS and the FERS statutes as one "the duties of whose *position*" are "primarily" the "investigation, apprehension, or detention" of those suspected or convicted of federal offenses. 5 U.S.C. §§ 8331(20), 8401(17) (emphasis added). Thus, under the statutes, an employee may only receive LEO retirement credit if the *position* he or she occupies primarily involves certain specified duties.

Moreover, the Board's approach is consistent with OPM regulations. The inclusion of the conjunctive "and" in sections 831.902 and 842.802 clearly indicates that all three criteria must be demonstrated in order for a position to be LEO-eligible. The 6 factor *Bingaman* test only considered prongs (ii) and (iii) to determine whether the officers' duties occupied a "substantial portion" of their working time (prong (ii)), and were assigned on a "regular and recurring basis (prong (iii))."[3] The approach used by the Board here affirmatively involves consideration of prong (i) of sections 831.902 and 842.802 so as to ensure that in addition to consisting of duties that occupy a substantial portion, if not 50 percent or more, of the officer's working time and that occurred on a regular and recurring basis, the position exists currently as a LEO position.

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3. Under the six *Bingaman* factors, an LEO "commonly 1) has frequent direct contact with criminal suspects; 2) is authorized to carry a firearm; 3) interrogates witnesses and suspects, giving *Miranda* warnings when appropriate; 4) works for long periods without a break; 5) is on call 24 hours a day; and 6) is required to maintain a level of physical fitness." *Bingaman*, 127 F.3d at 1436 (citing *Hobbs v. Office of Pers. Mgmt.*, 58 M.S.P.R. 628 (1993)).

Placing emphasis on why the position exists is also consistent with the legislative intent in providing for the LEO retirement program: to limit LEO-eligibility to rigorous positions that retirement at an unusually early age is appropriate. A Senate Report stated that LEO positions should be "composed, insofar as possible of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the federal service." S. Rep. No. 93-948, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3698, 3699. Accordingly, Congress established maximum retirement ages for LEO employees such as FBI Special Agents and for employees serving in other positions which are statutorily entitled to LEO retirement coverage. *See* 5 U.S.C. §§ 8335, 8425. LEO employees, for instance, are often required to retire no later than between 55 and 57 years of age, or when they have accrued twenty years of creditable service if they are beyond those ages when they completed the twenty years. *See id.* Congress further has authorized an agency head to determine and fix minimum and maximum limits of age within which an original appointment may be made to a LEO position. *See* 5 U.S.C. § 3307(e) (1994). For instance, all Department of Justice LEO positions have a maximum entry age of 37, which may be waived for applicants up to 40 years of age. In assessing why the position exists, factors such as an early mandatory retirement age and a maximum entry age should be considered in determining whether the "basic reasons for the existence of the position" consists of duties that will make the employee LEO-eligible. Examination of such factors will be quite probative in determining whether the position really exists as a LEO position, that is, its job description and actual duties consist of tasks that only a young and physically fit individual could perform.

The dissent concludes that the Board improperly "treated the purpose of the 'existence' of the position . . . as turning on the basic reasons for the position's 'creation.' "[4] Although in several places, including the concluding paragraph, the Board's opinion misstates the law as requiring that the position be "created" primarily for the performance of LEO duties, the Board's examination of the duties actually performed by the officers demonstrates that it knew it had to determine the reasons why the position existed at the time of application for LEO credit, not merely when it was originally created. As noted by the dissent, early in its opinion, the Board stated that under its new, position-oriented approach, "if the position was not created for the purpose of investigation, apprehension, or detention, then the incumbents of the position would not be entitled to LEO credit." *Watson*, 86 M.S.P.R. at 321. Significantly, however, the Board did not stop there. It went on to state in the very next sentence:

> This is not to say that the Board will not consider evidence of what duties the appellants performed from day-to-day in the GS-083 Police Officer position. Rather, the Board will consider that evidence, along with all of the other evidence of record, to ascertain whether the appellant is entitled to LEO retirement coverage.

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4. The dissent believes that the Board looked exclusively at why the position was created. The dissent states, "the reasons for the existence of the position cannot be based solely upon the historical reasons for the creation." This premise is crucial to the dissent's conclusion that the Board applied the wrong legal standard.

Id. This statement indicates that the Board knew that even if the official documentation of the position's creation did not support an applicant's LEO eligibility, the Board still needed to inquire into the applicant's actual duties as alleged. Moreover, in describing why it was departing from the *Bremby* approach, the Board specifically noted that its new approach would "more affirmatively take into account the *basic reasons* for the *existence* of the position." *Id.* (emphases added).

The Board's approach included consideration of both the position documentation and actual duties. First, the Board determined the purpose for the creation of the officers' position in the GS-083 series. *Id.* This is an altogether logical and proper place to begin. In doing so, it considered the OPM Classification Standards, the OPM Guide, and the Position Description. *Id.* at 323-26. It found that, as created, the position was not LEO-eligible. *Id.* at 326. The Board next determined whether the purpose for the position changed, *i.e.*, whether the purpose for the position's existence was different than the purpose for its creation. *Id.* at 321. In doing so, it considered — in equivalent detail and at an equivalent length of its treatment of position documents — the testimony regarding the officers' actual, day-to-day duties. *Id.* It found that the basic reasons for the position's existence were not different from those for its creation, and thus, that the officers were not LEO-eligible. *Id.* at 328. This second step was also proper and necessary, as the Board clearly understood. In concluding its analysis, the Board stated: "While an incumbent's actual duties are relevant . . . the evidence of the actual duties performed in these cases does not persuade us that — contrary to the official documentation of the

position — 'the basic reasons for the existence of the position' was [sic] actually investigation, apprehension, or detention." *Id.* If the Board believed that eligibility for LEO retirement credit is determined solely by the reasons for the position's creation, it would not need to consider, much less devote equivalent treatment to, the testimony regarding the officers' day-to-day duties. Nor did it consider actual duties only as an alternative ground for decision. Indeed, the Board specifically noted that its new position-oriented approach did not foreclose other officers in the GS-083 series from showing that the basic reasons for the existence of their positions had shifted from peace-keeping to the investigation, apprehension, or detention of criminals or suspects. *Id.* at 330 n.7.

We note that footnote 7 of the Board's opinion, like the concluding paragraph, incorrectly states the law as requiring that applicants "must show that the position was created as an LEO-position." *Id.* However, the portion of the Board's opinion explaining its analysis reflects that it correctly understood that the reasons for the position's *existence*, not merely its creation, are determinative. Such reasons could be shown by proof that the duties an employee performs day-to-day differ from those of the OPM classification standards, the OPM Guide, or the Position Description. *Id.* at 321; *see also Ellis v. United States*, 610 F.2d 760 (Ct. Cl. 1979) (finding that the duties actually performed by the officer were not properly set forth in their position description, and thus granting a retirement annuity under 5 U.S.C. § 8331(21)). By providing this alternative way to show entitlement to LEO credit, the Board necessarily concluded that the reasons for the existence of the position can be established not only by

the position papers but also by actual duties performed. Thus, contrary to the dissent's suggestion, we conclude that the Board applied the correct legal standard. The Board's analysis properly included the reasons for the position's existence, and not merely its creation.

2. Consistency with *Bingaman*

The Board's approach is also wholly consistent with the approach taken by this court in *Bingaman*. Petitioners seem to read *Bingaman* to require a rigid, bright-line test based on the six factors of the Board's decision. Petitioners also argue that other factors-such as whether the officers' duties are commensurate with Norfolk City police officers — should be considered as well. This court, however, has never adopted the *Bingaman* factors; nor has the court held that federal employees are always entitled to LEO coverage so long as they satisfy the *Bingaman* factors. Indeed, as noted in *Bingaman* and *Hannon v. Department of Justice*, 234 F.3d 674 (Fed. Cir. 2000), the *Bingaman* factors were developed by the Board, *not by this court* as "captur[ing] the essence of what Congress intended." *Bingaman*, 127 F.3d at 1436; *Hannon*, 234 F.3d at 677-78 (noting that in *Bingaman*, this court "merely recognized and applied the [*Bingaman*] factors," factors which had been "developed" by "the Board, not this court"). In examining the duties performed by these petitioners, the *Bingaman* court only addressed prongs (ii) and (iii) of 5 C.F.R. §§ 831.902, 842.802. *Bingaman*, 127 F.3d at 1436 ("Applying [the *Bingaman* factors], the [AJ] properly found that Bingaman failed to establish that he is eligible for LEO retirement credit."). The court did not need to consider prong (i) of the test — examining the basic

reasons for the existence of the position — because the court found that the petitioners had failed to meet their burden of proof regarding the second and third prongs of 5 C.F.R. §§ 831.902, 842.802.

Moreover, some of the most probative factors are not even a part of the six-factor *Bingaman* test. *Hannon*, 234 F.3d at 678. For instance, in *Hannon*, this court held that the Board should consider hazard as a probative factor in assessing LEO retirement coverage. *Id.* at 679 ("The Board has recognized . . . that hazard is a significant element of law enforcement work."). Moreover, in light of evident legislative intent to grant LEO credit only to those who have jobs requiring physically demanding work, other factors, such as whether the officer must retire at an early age or whether there is an early maximum entry age, would also be highly probative in determining whether the officer is entitled to LEO retirement credit. Indeed, while all of the *Bingaman* factors may always be considered, some are more probative than others. For example, whether the job requires an annual physical fitness test may be probative in assessing whether the position is designed to be limited to young and physically fit individuals who would be forced to retire at an unusually early age, depending on the stringency of the test. Other *Bingaman* factors, however, are normally less probative because they do not always distinguish between officers who do LEO work and those who do not. For example, guards mainly protecting life and property and police officers whose jobs primarily involve pursuing or detaining criminals all might carry a firearm, be on call 24 hours a day, or have to work long periods without taking a break. The regulations, however, specifically exclude guards who mainly protect life

and property from LEO retirement coverage. *See* 5 C.F.R. §§ 831.902, 842.802. Other factors, proposed by petitioners, have little relevance. For instance, that petitioners' positions are equivalent to those of Norfolk City police officers has little probative value because not all Norfolk City police officers would be entitled to LEO credit if they were federal employees.

C. Determining LEO Eligibility for these Norfolk Naval Base Police Officers

In this case, the Board held that petitioners' applications for LEO retirement credit were properly denied, because the relevant evidence of record (including OPM classification standards, the OPM Guide, the Position Description, and the testimony detailing the officers' daily or frequent duties) did not show that the GS-083 police officer position was "created for the basic reason" of conducting LEO activities.[5] *Watson*, 86 M.S.P.R. at 328-29. The Board's review of the "primary duties" of the officers as detailed in official documentation and in their testimony before the AJ, and the fact that the

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5. Under the FERS statute, the duties of the position must be "sufficiently rigorous that employment opportunities are required to be limited to young and physically vigorous individuals." 5 U.S.C. § 8401(17)(A)(ii). The Board noted that because the evidence showed that the duties of the Norfolk Naval Base police officers were not primarily the investigation, apprehension, or detention of persons convicted or suspected of criminal offenses, it need not consider whether the duties of the *Watson* petitioners met the "sufficiently rigorous" requirement under the FERS. *Watson*, 86 M.S.P.R. at 321 n.2. We see no error in this approach, which, we note, has the virtue of judicial efficiency.

officers' positions were neither limited by an early mandatory retirement age nor a youthful maximum entry age all support the Board's conclusion that these Norfolk Naval Base police officers are not entitled to LEO retirement credit.

In order to determine that an officer is entitled to LEO retirement credit, the officer must show that the *primary* duties of his or her position, as defined by 5 C.F.R. §§ 831.902, 842.802, are the investigation, apprehension, and detention of criminals or suspects. The most probative factors, we hold, are: 1) whether the officers are merely guarding life and property or whether the officers are instead more frequently pursuing or detaining criminals; 2) whether there is an early mandatory retirement age; 3) whether there is a youthful maximum entry age; 4) whether the job is physically demanding so as to require a youthful workforce; and 5) whether the officer is exposed to hazard or danger. The six *Bingaman* factors may also be considered as necessary and appropriate.

Evaluation of those factors in this case supports the Board's conclusion that the petitioners' positions as Norfolk Naval Base police officers did not exist primarily for the purpose of investigating, apprehending, or detaining criminals or suspects. Individuals applying for a position as a Norfolk Naval Base police officer, unlike LEO appointments in many other departments, are not required to retire at an early age; nor are officers required to satisfy certain maximum entry age requirements. An officer could conceivably enter the Norfolk Naval Base police force at age 50, and retire at age 70. This hardly seems to be consistent with awarding LEO retirement credit only for those positions

which are so physically taxing as to warrant retirement after 20 years of service.

The official documentation of the officers' position provides further support that the position was not designed to be LEO-eligible. The OPM classification standards for GS-083 officers supports the Board's conclusion that the Norfolk Naval Base police officers do not satisfy the definition of an LEO. The standards state that the "primary mission and purpose of police organizations is to enforce law, maintain law and order, preserve the peace, and protect the life and civil rights of persons." OPM Classification Standards for the GS-083 Occupation Series, Occupational Information at 2-4. The OPM classification standards also state that "[m]ost police officers are engaged in patrol duties and/or traffic control." *Id.* Those duties are specifically designated by the OPM regulations to be non-LEO duties. 5 C.F.R. §§ 831.902, 842.802. The OPM Guide reiterates the point made by the OPM Classification Standards that "[t]he primary mission of police officers in the Federal service is to maintain law and order." Although noting that the "distinction between police and guard work may not be an easy one to make," the Guide differentiates between police officers who are eligible for LEO credit and guards who are not. For instance, the Guide notes that Criminal Investigators in the GS 1811 series are eligible for LEO credit because the series consists of "[p]ositions primarily responsible for investigating alleged or suspected major offenses or violations of specialized laws of the United States." As noted by the Board, "[t]his clarification sets forth OPM's view that, unlike positions in the GS-1811 series, the primary duties of positions in the GS-083 Police Officer series are *not* the

investigation or apprehension of persons suspected or convicted of offenses against the criminal laws of the United States." *Watson*, 86 M.S.P.R. at 325 (emphasis added).

The Position Description also supports the Board's conclusion that these Norfolk Naval Base police officers are not entitled to LEO retirement coverage. The introduction to the Position Description states that the police officers "provide[ ] community policing, law enforcement, and security for the investigation of crimes, [and] protection of life and property." The section of the Position Description entitled "Major Duties and Responsibilities" states that "[t]he incumbent serves as a Police Officer assigned to a community policing area." It then states, *inter alia*, that the "position requires an incumbent to perform duties that *involve* the investigation, arrest, apprehension or detention of criminals and/or suspected criminals" (emphasis added); significantly, however, the Position Description does not state that the duties are *primarily* the investigation, apprehension or detention of criminals and/or suspected criminals. Other major duties listed in the Position Description include: 1) providing police escorts and directing traffic; 2) serving warrants and issuing summons; 3) making arrests; 4) testifying in court; 5) reporting unsafe conditions existing in the streets and/or public facilities; 6) responding to emergency situations; and 7) conducting preliminary investigations, such as by interviewing witnesses or collecting and preserving evidence.

The Board also properly concluded that the testimony of the officers describing their daily or frequent duties did not show that the officers were entitled to LEO retirement

coverage. While the officers testified to some instances involving great danger, the Board concluded that the testimony as a whole showed that the police officers' duties mostly involved being "on the lookout for potential violations of law, conduct[ing] generalized patrols, guard[ing] the gates, check[ing] buildings at night to ensure that they were secure, enforc[ing] traffic laws, and act[ing] as 'first responders' to emergencies or potential crimes." *Id.* at 328. The Board also considered conflicting evidence as to whether at least 50 percent of the officers' duties consisted of LEO-type work. The Board opinion credited the testimony of Police Commander Hemmingsen, who reviewed the Incident Complaint Reports to determine whether the officers performed LEO duties. *Id.* at 326. Commander Hemmingsen also testified before the AJ that the Norfolk Naval Base police officers did not perform LEO-type work at least 50 percent of the time, as required by sections 831.902 and 842.802. This contradicted the testimony of petitioners' witnesses who testified that their duties were over 50 percent. Substantial evidence thus supports the Board's conclusion that the officers' primary duties were not LEO duties. *Id.* at 328-29.

Indeed, the official documentation of the GS-083 series indicates that all officers in that series in all departments of the federal government are presumptively not entitled to LEO credit. Thus, officers in that series would only be eligible for LEO credit if they could persuade the agency or Board that "contrary to the official documentation of the position," the duties actually performed by the officers on a regular and recurring basis clearly indicate that the "basic reasons for the existence of the position" was the investigation, apprehension, or detention of criminals or suspects. *Id.*

Appendix A

Conclusion

Under a legally correct construction of the statutes and regulations, a federal police officer seeking LEO early retirement credit must prove that he or she occupied a position that primarily required the investigation, apprehension, or detention of criminals or suspects, rather than merely the protection of life or property, and that their duties were so physically demanding as to necessitate his or her retirement at an unusually early age. The Board held that these Norfolk Naval Base police officers have not proven that their primary duties nor those of their position involved the investigation, apprehension, or detention of criminals or suspects. The Board's finding is supported by substantial evidence. Further, the Board's method of analysis was consistent with the statutes, the regulations, and the case law. Therefore, the Board's decision is

AFFIRMED.

Appendix A

FRIEDMAN, *Senior Circuit Judge*, dissenting in part.

I agree with most of what the court says. I part company with it, however, in its analysis and approval of the theory upon which the Board upheld the Navy's denial of law enforcement officer (LEO) status to these employees.

I agree that the Board justifiably adopted its broader "position-oriented" approach in LEO cases as more accurately reflecting the statutory test for LEO status of whether the "duties of [the employee's] position (i) are primarily (I) the investigation, apprehension, or detention" of criminals, 5 U.S.C. § 8401(17)(A), and OPM's implementing regulations that define "primary duties" as duties that, among other things, "(i) [a]re paramount in influence or weight; that is, constitute the basic reasons for the existence of the position," 5 C.F.R. § 831.902. As I read the Board's opinion, however, the Board treated the purpose of the "existence of the position" in the regulatory definition as turning on the basic reasons for the position's "creation."

Early in its opinion the Board stated that under the new "position-oriented" approach it was adopting, "if the position was not created for the purpose of investigation, apprehension, or detention, then the incumbents of the position would not be entitled to LEO credit." 86 M.S.P.R. at 321. After stating that the OPM regulations require that "the 'basic reasons' for the existence of the position must be the performance of LEO duties," the Board stated that the administrative judge "did not look to see why the agency created the GS-083 Police Officer position, but instead examined whether the appellants' experiences showed that their duties 'involved' some LEO work." *Id.* at 323. The Board ruled that "[t]he classification standards and

OPM's Guide for evaluating a GS-083 Police Officer position show that the basic reason for the existence of this position is to maintain order, protect life and property, and guard against or inspect for violations of law." *Id* at 325. It stated that the position's description shows that "the position was created for the primary purpose of maintaining law and order and protecting persons and property by means of community policing and traffic control." *Id.* at 326. It pointed out that there was "evidence showing that the GS-083 Police Officer position at the NNB was not created as an LEO position" and stated that "the evidence of the actual duties performed in these cases does not persuade us that — contrary to the official documentation of the position — 'the basic reasons for the existence of the position' was actually investigation, apprehension, or detention." *Id.* at 328-29.

The penultimate paragraph of the opinion, captioned "ORDER," stated:

> For the reasons stated above, we find that the appellants are not entitled to LEO service credit because the GS-05-083 Police Officer position they occupied at the NNB was not created primarily to perform LEO duties as defined by statute. The initial decisions are REVERSED. . . .[7]

Id. at 330.

The Board reiterated the view that LEO status turned upon the reason for the "creation" of the position in footnote 7, where it stated: "individuals who are not parties to these appeals are not precluded in future cases from attempting to show that the basic reason for the creation for the GS-05-083 Police Officer position at the NNB was the performance

of LEO duties . . . any future appellants who encumber or did encumber this position must show that the position was created as a LEO position." *Id.*

Although the Board referred three times to the reason for the "existence" of the position, a fair reading of its opinion indicates to me that the critical and controlling factor for the Board in determining LEO status was the reason for the "creation" of the position and not for its "existence," as the regulation provides. The reasons for the creation of a position are not necessarily the same as those for its existence. A position could have been created for non-LEO purposes, but over time the duties could change sufficiently that it continued to exist for LEO purposes. Of course, the reason for the creation of a position may be a significant factor in determining the reasons for its existence. The two concepts are not the same, however, and the reasons for the existence of a position cannot be based solely upon the historical reasons for its creation.

OPM's regulation merely defines one element of the statutory standard governing the existence of LEO status — the meaning of the "primary duties" of the position. The portion of that definition here involved — duties that "constitute the basic reasons for the existence of the position" — is unambiguous. In applying the LEO statute, the Board's responsibility was to apply that definition to the facts of this case, not to reformulate the definition by substituting the concept of the reasons for "creation" of the position for the reasons for its "existence."

I would vacate the Board's decision and remand for the Board to reconsider under the proper standard.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD DATED JULY 17, 2000

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
DC-0842-99-0483-I-1

JAMES A. WATSON, ET AL.,

Appellant,

v.

DEPARTMENT OF THE NAVY,

Agency.

DATE: JUL 17 2000

* * *

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 These cases are before the Board on the agency's petitions for review of the September 3, 1999 initial decision in the *Watson* consolidation of appeals and the September 17, 1999

initial decision in the *Jefferson* consolidation of appeals. The initial decisions in both consolidations awarded law enforcement officer (LEO) service credit to the appellants. The Board GRANTS the motion of the appellants in the *Watson* and the *Jefferson* consolidations to consolidate those groups of cases on petition for review, finding that this would expedite the processing of the appeals and would not adversely affect the interests of the parties.[1] 5 C.F.R. § 1201.36. For the reasons stated below, the Board GRANTS the petitions for review, REVERSES the initial decisions, and SUSTAINS the agency's determination that the appellants are not entitled to LEO service credit.

BACKGROUND

¶2 The appellants occupy or had occupied the position of GS-083 Police Officer, grade level GS-05, at the Norfolk, Virginia, Naval Base (NNB or Base). The appellants in the *Watson* consolidation are covered under the Federal Employees' Retirement System (FERS), while the appellants in the *Jefferson* consolidation are covered under the Civil Service Retirement System (CSRS). Jefferson Initial Appeal File (IAF), Tabs 10 and 27. The appellants requested LEO retirement credit for some or all of the time spent in the position. After the agency denied the requests, the appellants filed the instant appeals.

¶3 The administrative judge held a single hearing for both groups of appellants and based his initial decisions on a common evidentiary record. He found that the appellants are

1. The list of the consolidated appeals is attached to this Order as an Appendix.

entitled to LEO status. On petition for review, the agency argues that the primary duties of the position are not ones entitling the incumbents to special LEO retirement credit.

ANALYSIS

¶4 In finding that the appellants are entitled to LEO service credit, the administrative judge followed the approach set forth in *Bremby v. Department of the Navy*, 81 M.S.P.R. 450 (1999). Watson Initial Decision (ID) at 30-35. Under that approach, even if the incumbent of a Police Officer position spends the majority of his time patrolling and the evidence shows that his primary duties involve maintaining law and order and protecting life and property, he still is entitled to special LEO retirement credit if he can show that his primary duties "*involve* the investigation, apprehension and/or detention of criminals and/or suspected criminals." *Bremby*, 81 M.S.P.R. ¶ 15. That statement suggests that even if the primary duties of the GS-083 Police Officer position consist of non-LEO duties, namely, maintaining law and order and protecting life and property, the incumbents of the position are nonetheless entitled to LEO credit if their primary duties "involve," to some unspecified degree, LEO duties. Moreover, the *Bremby* approach requires the fact-finder to focus on the incidents and events encountered by the incumbent of the position for certain periods of time to see if he, as an individual, is entitled to LEO service credit, either for that period of time or for his entire period of service in the position (the "incumbent-oriented" approach). *Id.*, ¶¶ 13-18.

Appendix B

¶5 As discussed in Member Marshall's dissent in *Hamilton v. Department of Defense*, 85 M.S.P.R. 409, 412 (2000) (*Hamilton* Dissent), a case which also involved GS-05-083 Police Officers at the NNB, the approach set forth in *Bremby* for determining LEO entitlement placed too much emphasis on the day-to-day duties of a particular incumbent over a limited period of time. *Hamilton* Dissent, ¶¶ 9-11. For the reasons stated below, the Board now adopts an approach that more affirmatively takes into account the basic reasons for the existence of the position (the "position-oriented" approach). *Id.*, ¶¶ 5-8. Under this approach, if the position was not created for the purpose of investigation, apprehension, or detention, then the incumbents of the position would not be entitled to LEO credit. This is not to say that the Board will not consider evidence of what duties the appellants performed from day-to-day in the GS-083 Police Officer position. Rather, the Board will consider that evidence, along with all of the other evidence of record, to ascertain whether the appellant is entitled to LEO retirement coverage. *Accord Ferrier v. Office of Personnel Management*, 60 M.S.P.R. 342, 345 (1994) (in determining whether a position is an LEO position, the Board must examine all relevant evidence, including the position description), *reconsideration denied*, 66 M.S.P.R. 241 (1995).

¶6 The proper approach to adjudicating claims for LEO service credit may not have been obvious in earlier cases, such as *Bremby*, in part because the evidentiary records in those cases may not have been fully developed. Indeed, the agency here argued that the Board's decision in *Bremby* was "grossly inaccurate" in describing the conditions at the NNB and the primary duties of the GS-083 Police Officer position.

Hearing Transcript (Tr.) at 258. However, the voluminous evidence presented in these appeals covers the creation of the Police Officer position and its classification in the GS-083 series, the way security is handled at the NNB, the division of the Base into patrol areas, and the types of positions created by the Navy to deal with criminal, investigative, security, and police matters. Thus, we find it appropriate in these cases to adopt a more position-oriented approach to the adjudication of claims for LEO retirement credit.

The statute and the regulation

¶7 "It is axiomatic that statutory interpretation begins with the language of the statute." *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990), citing *Mallard v. U.S. District Court for the Southern District of Iowa*, 490 U.S. 296, 300, 109 S. Ct. 1814, 1818 (1989). "If . . . the language of the statute is clear and fits the case, the plain meaning of the statute will be regarded as conclusive." *Id.* (citations omitted).

¶8 In relevant part, the FERS statute at 5 U.S.C. § 8401(17)(A) defines a "law enforcement officer" for retirement purposes as —

> (A) an employee, the duties of whose position —
>
> (i) are primarily —
>
> (I) the investigation, apprehension, or detention of

> individuals suspected or convicted of offenses against the criminal laws of the United States . . . .

The CSRS statute at 5 U.S.C. § 8331(20) contains identical language.[2]

¶9 Both the FERS and the CSRS statutes give OPM the authority to "prescribe regulations to carry out the provisions of [the statute] administered by [OPM]." 5 U.S.C. §§ 8347(a) and 8461(b). OPM's interpretation of statutes which Congress charges it to administer, such as the retirement statute here, is normally entitled to great deference. *Newman v. Love*, 962 F.2d 1008, 1012 (Fed. Cir. 1992).

¶10 OPM's FERS regulation at 5 C.F.R. § 842.802 defines "primary duties" for purposes of LEO retirement credit as —

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2. The FERS statute additionally requires that the duties of the position be "sufficiently rigorous that employment opportunities are required to be limited to young and physically vigorous individuals." 5 U.S.C. § 8401(17)(A)(ii). Because the evidence shows that the duties of the GS-083 Police Officer position are not primarily the investigation, apprehension, or detention of persons convicted or suspected of federal offenses, the Board need not consider whether the "sufficiently rigorous" requirement is met for the Watson appellants, who are under FERS. Thus, the CSRS and FERS statutes are the same for purposes of this analysis.

those duties of a position that —

(a) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(b) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(c) Are assigned on a regular and recurring basis.

¶11 Under the regulations, "duties that are of an emergency, incidental, or temporary nature cannot be considered 'primary' even if they meet the substantial portion of time criterion." 5 C.F.R. § 842.802. Further, the regulations state that the definition of law enforcement officer "does not include an employee whose primary duties involve maintaining order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than those who are suspected or convicted of offenses against the criminal laws of the United States." *Id.* OPM's CSRS regulations contain the same requirements. 5 C.F.R. § 831.902.

¶12 It is clear from the language of the statute that it is the "duties of [the] position" that must be examined to determine whether an employee meets the definition of a "law enforcement officer." Thus, under the statute, an employee may receive LEO credit only if the position he occupies is a LEO position, that is, a position whose primary duties are the "investigation, apprehension, or detention of individuals

suspected or convicted of offenses against the criminal laws of the United States." OPM's regulations thus comply with the legislative mandate for a position-oriented approach in cases of requests for LEO credit by requiring that the "basic reasons" for the existence of *the position* must be the performance of LEO duties. In these appeals, the parties submitted extensive argument and evidence regarding certain on-the-job situations encountered by the appellants during discrete time periods, and the administrative judge spent a great deal of effort reviewing that evidence. However, because the administrative judge followed *Bremby*, he did not look to see why the agency created the GS-083 Police Officer position, but instead examined whether the appellants' experiences showed that their duties "involved" some LEO work. This approach gave no weight to subsection (a) of the regulation quoted above. *See* 5 C.F.R. § 842.802 (defining "primary duties" for purposes of 5 U.S.C. § 8401(17)).[3]

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3. As *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1 (1998), *aff'd*, No. 99-3001 (Fed. Cir. Dec. 13, 1999) (Table), *Bremby*, *Hamilton*, and these cases illustrate, appeals involving GS-083 Police Officers in the Department of Defense reach the Board at different times, in different legal postures, and with different evidentiary records. Moreover, in many ways it is happenstance which appeals involving a position in the same classification series in the same agency reach the Board first; for instance, the agency may issue final decisions on the LEO requests of some employees sooner than it does for others or one administrative judge may adjudicate a case involving the same position quicker than another administrative judge might. Consequently, the Board could issue serial opinions which can, as illustrated by *Bremby* and these cases, lead to potentially inconsistent results.

(Cont'd)

Appendix B

The classification standards

¶13 The agency stated, and the appellants have never disputed, that the Police Officer position at issue was classified in the GS-083 occupational series using standards promulgated by OPM. Watson IAF, Tab 4, Subtab 1. The agency, again without dispute, quoted the OPM standard for the GS-083 series as follows:

> The *primary mission* of police officers in the Federal service is to *maintain law and order.* In carrying out this mission, police officers *protect life and property*, and the civil rights of individuals. They prevent, detect, and investigate violations of laws, rules, and regulations involving accidents, crimes, and misconduct involving misdemeanors and felonies. They arrest violators, assist in the prosecution of criminals, and serve as a source of assistance to persons in emergency situations.
>
> . . . .

(Cont'd)

The Board has a procedure for adjudicating an appeal as a "class appeal" if the appellants file as representatives of a class of employees, and the administrative judge finds that "a class appeal is the fairest and most efficient way to adjudicate the appeal and that the representative of the parties will adequately protect the interests of all parties." 5 C.F.R. § 1201.27(a). Use of the class-appeal procedure might be the fairest and most efficient way of deciding the LEO status of a single position, e.g., the GS-083 Police Officer position in the Department of the Navy at the NNB.

Appendix B

> ***Most police officers are engaged in patrol duties and/or traffic control.*** In performing patrol duties, they serve as a deterrent to crime and other violations of laws, rules, and regulations. Crime prevention is enhanced by the presence of uniformed officers in an area and by his [sic] being continually alert in observing, inspecting, and investigating circumstances or individuals which appear unusual and suspicious. Police officers regulate pedestrian and vehicular traffic; prevent accidents, congestion, and parking problems; give warnings; issue citations for traffic violations; and make arrests if necessary. They conduct preliminary investigations of crimes, investigate accidents, dispose of complaints, recover stolen property, counsel adults and juveniles, and assist persons needing help. Typically, investigations that remain incomplete at the end of an assigned shift are turned over for completion by detectives or criminal investigators.

Id. (emphasis added), citing OPM Classification Standards for the GS-083 Occupation Series, Occupational Information at 2-4.

¶14 A December 1997 "Grade Evaluation Guide for Police and Security Guard Positions GS-0083/GS-0085" (the Guide) published by OPM states that the "*primary* mission and purpose" of the Police Officer series, GS-083, is "to enforce law, maintain law and order, preserve the peace, and protect the life and civil rights of persons." Greenfield IAF, Tab 29,

Guide at 2 (emphasis added).[4] The Guide reiterates at least once that "[t]he *primary* mission of police officers in the Federal service is to *maintain law and order.*" *Id.*, Guide at 3 (emphasis added). It also says that "[i]n some instances, the distinction between police and guard work may not be an easy one to make, because of the similarities between the two kinds of work." *Id.*, Guide at 2. OPM's Guide explains to classifiers that positions in the GS-083 Police Officer series are distinguished from positions in the GS-1811 Criminal Investigator series in that the latter series consists of "[p]ositions primarily responsible for investigating alleged or suspected major offenses or violations of specialized laws of the United States." *Id.*, Guide at 1. This clarification sets forth OPM's view that, unlike positions in the GS-1811 series, the primary duties of positions in the GS-083 Police Officer series are not the investigation or apprehension of persons suspected or convicted of offenses against the criminal laws of the United States.

¶15 The classification standards and OPM's Guide for evaluating a GS-083 Police Officer position show that the basic reason for the existence of this position is to maintain order, protect life and property, and guard against or inspect for violations of law. OPM's classification materials thus support a finding that the GS-083 Police Officer position does not meet either the statutory or regulatory definition of

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4. The appeal of *Greenfield v. Department of the Navy*, MSPB Docket No. DC-0842-99-0481-I-1, was included in the consolidated hearing in these cases. ID at 2. We take note of the Guide because it is in the record accompanying these appeals and because the Board may take official notice of such documents. *See* 5 C.F.R. § 1201.64. The Board is issuing a separate opinion in the *Greenfield* appeal.

a "law enforcement officer." The agency's denial of LEO status to the appellants is therefore consistent with OPM's classification guidance. It is also consistent with *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1 (1998), *aff'd*, No. 99-3001 (Fed. Cir. Dec. 13, 1999) (Table), a case in which the Board sustained the agency's decision to deny LEO credit to Police Officers in the Department of the Navy who also were in the GS-083 classification series.

The position descriptions

¶16 Position description (PD) No. 6374A covers the GS-083 Police Officer position, grade level 5, and is the one under which the appellants in the *Watson* and *Jefferson* consolidations worked. Watson IAF, Tabs 9 and 26; Jefferson IAF, Tab 6, Subtab 2b. The Introduction to PD No. 6374A states that the position is in the Community Policing Division, Security Department, at the NNB, and that the Division "provides community policing, law enforcement, and security for the investigation of crimes, protection of life and property." It also states that this mission "*includes* arrest, apprehension, and detainment of those person(s) suspected of violations of United States Code, and applicable state statutes." *Id.* (emphasis added). The section of the PD entitled "Major Duties and Responsibilities" begins by saying that "[t]he incumbent serves as a Police Officer assigned to a community policing area." It then states that the "position requires the incumbent to perform police duties that *involve* the investigation, arrest, apprehension or detention of criminals and/or suspected criminals." *Id.* (emphasis added). That section of the PD goes on to say that the incumbent "provides police escorts and directs traffic," "reports unsafe

conditions existing in street or other public facilities," responds to emergency situations, and "conducts preliminary investigations."

¶17 The PD shows that while incumbents in the GS-083 Police Officer position were expected to investigate, apprehend, or detain criminals or suspected criminals as the need arose, the position was created for the primary purpose of maintaining law and order and protecting persons and property by means of community policing and traffic control. The PD is therefore consistent with OPM's classification guidance.

The duties of GS-083 Police Officers at the NNB

¶18 The witnesses, including the appellants who testified, described the duties of a GS-083 Police Officer at the NNB. Commander Hemmingsen said that GS-083 Police Officers can investigate misdemeanors committed in their presence, traffic violations, and violations of Navy rules or regulations. Tr. at 1505. Other criminal or suspected criminal activity is investigated by NCIS. *Id.*

¶19 Appellant Watson stated that he patrols for an 8-hour shift, either in a car or on foot, "looking for criminal activity" and traffic violations. *Id.* at 690. Appellant Acres said that when he is patrolling, he is looking for "[a]nything that happens," but he declined to say whether he was looking for any particular criminal or suspected criminal. *Id.* at 798. Commander Hemmingsen averred, without rebuttal, that the majority of patrols are generalized, that is, done for the purpose of being visible and responding to crimes in progress,

and that they are not specialized patrols done with the intent of focusing on a particular problem, criminal, or suspect. *Id.* at 1481.

¶20 Appellant Pennington said that GS-083 Police Officers act as "first responders" to crime scenes, that is, they render first-aid or assistance to anyone who is injured, check to see if any suspects are still in the immediate area, secure the scene, and gather preliminary information. *Id.* at 131. Commander Hemmingsen stated that the officers patrol up to the perimeter of the Base. *Id.* at 1235-36. In addition to patrolling and responding to emergencies or reports of criminal activity, the appellants also guard the gates through which traffic enters the Base.

¶21 Appellant Pennington acknowledged that he stood guard duty at the gates 24 hours (3 working days) per week. *Id.* 271. Appellant Streat stated that he stands gate duty 2 to 3 times per week. *Id.* at 650. In his view, gate duty is LEO work because each individual who comes through the gate is a potential suspect. *Id.* at 656-57. Commander Hemmingsen declared that, at the time of the hearing, four GS-083 Police Officers were assigned to gate duty as their sole duty. *Id.* at 1727-28. Hemmingsen said that the Police Officers check decals on vehicles entering the NNB and ask visitors for identification in order to protect the property and persons on the NNB. *Id.* at 1463. GS-083 Police Officers also check locks and doors on "hot buildings," that is, buildings which hold money or classified materials and which are unoccupied at night. *Id.* at 1722.

Appendix B

¶22 In an attempt to prove their entitlement to LEO coverage, the appellants who testified offered examples of incidents in which they were involved. Appellant Pennington testified that he once was shot at by an individual who had been drinking and was under the influence of marijuana as he (Pennington) drove by in a marked patrol car. *Id.* at 127. He described talking a sailor out of committing suicide, assisting persons from a vehicle that had caught fire, tackling a person who had pulled a gun on him, and writing 600 traffic tickets in 1997. *Id.* at 146-47, 154, and 171. Appellant Watson stated that he used his gun when he saw an individual brandishing a weapon in front of a restaurant close to one of the Base gates. *Id.* at 682. He also discussed finding a gun in a vehicle that he had stopped and detaining a juvenile who had violated curfew. *Id.* at 684-88. To show that the appellants were not primarily engaged in LEO duties, the agency presented statistics based on Incident Complaint Reports (ICRs).

¶23 ICRs are forms that officers complete on "non-routine" incidents. *Id.* at 1367. They include data such as the date, time, and type of incident, as well as witness statements, advisement-of-rights forms, and information on whether drugs or alcohol were involved. *Id.* at 1367. In preparing for these appeals, Commander Hemmingsen located the ICRs still in existence for the relevant time periods, tried to "get a feel" for how much time was spent on each incident, looked at computer-aided dispatch records to help him determine how much time an officer spent on an incident, and estimated how much time each task involved in an incident may have taken, e.g., 15 minutes for serving a summons or issuing a speeding ticket. *Id.* at 1381-1422 and 1587-88. He explained that such estimates were necessary because ICRs do not show the time actually spent on an activity or incident. *Id.* at 1586.

¶24 Commander Hemmingsen also looked for information on the ICRs that might indicate if another officer assisted and, if so, how much time that officer spent on the matter. *Id.* at 1369. However, if the person writing the ICR did not include the name of any assisting officer, then the assisting officer was not credited with "LEO work."[5] *Id.* at 1369-70.

¶25 Commander Hemmingsen stated that older ICRs, particularly those filed more than 2 years before the hearing, were not available because they had been destroyed under recordkeeping disposal schedules or because the statute of limitations for the alleged crime had expired. *Id.* at 1432-33. He averred that if an officer did not record a task on an ICR, the officer was not given credit for performing that task. *Id.* at 1679.

¶26 Commander Hemmingsen excluded from his calculations periods of time when some of the appellants were not performing their regular duties at the NNB, for instance, time when appellant Rowland was on light-duty assignment

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5. This opinion refers to the incidents as "LEO work" because the agency assumed, for purposes of compiling its statistics, that each ICR documented a duty that fell under the statutory definition of "law enforcement officer." However, a number of ICRs document activity such as response to traffic accidents and issuance of abandoned vehicle notices and speeding tickets. *See, e.g.*, Watson IAF, Vol. II, Exs. C, G, and H; Tr. at 1381-1422 and 1587-88. For purposes of this opinion and in light of the Board's adoption of a position-oriented approach to LEO cases, we have not attempted to sort through the thousands of ICRs to determine which ones describe or arguably describe the investigation, apprehension, or detention of criminals or suspected criminals. Instead, this decision simply refers to the ICRs as documenting alleged "LEO work."

and when appellant Carney was detailed to Oceana. *Id.* at 1436-37. He also declared that some of the ICRs contained, in his opinion, tasks that were outside of the scope of employment, for example, taking photographs of a crime scene with a private camera, searching for a missing child at an off-site supermarket, questioning civilian desk clerks off Base, and breaking up a fight at a bar that was not on the Base. *Id.* at 1443-52. He therefore did not consider those activities to be "LEO work." *Id.*

Discussion of the evidence and findings

¶27 OPM's classification standards and guidance show that the GS-083 Police Officer position is not one whose duties are primarily the investigation, apprehension, or detention of criminals or suspected criminals. The PD for the GS-083 Police Officer position, which follows OPM's classification standards and guidance, is in accord. Weighed together with the evidence showing that the GS-083 Police Officer position at the NNB was not created as an LEO position is testimony that persons encumbering that position at the NNB were on the lookout for potential violations of law, conducted generalized patrols, guarded the gates, checked buildings at night to ensure that they were secure, enforced traffic laws, and acted as "first responders" to emergencies or potential crimes. None of these duties individually or collectively show that the GS-083 Police Officer position was created for the basic reason of investigating, apprehending, or detaining known criminals or suspects. While an incumbent's actual duties are relevant under subsections (b) & (c) of OPM's regulation defining "primary duties" for purposes of 5 U.S.C. § 8401(17), *see* 5 C.F.R. § 842.802, the evidence of the actual duties performed in these cases does not persuade us that —

contrary to the official documentation of the position — "the basic reasons for the existence of the position" was actually investigation, apprehension, or detention.

¶28 The agency representative said that "no one is arguing that the GS-083 police officers are not real police officers." *Id.* at 1610. Rather, she stated that the "question is one of whether or not their primary duties consist of investigation, apprehension or detention of [criminals] or people suspected of crimes, or whether or not they are primarily responsible for maintaining law and order, for which specifically LEO status is not authorized." Tr. at 1610-11. Along those same lines, the Board wishes to make clear that by denying the appellants LEO status, it is in no way implying that they do not face danger, do not perform police duties, and do not make an important contribution to the security of the NNB. Rather, their requests must be denied because their primary duties of maintaining law and order, protecting life and property, and guarding against potential violations of law do not meet the statutory definition of "law enforcement officer." *See Ryan v. Merit Systems Protection Board*, 779 F.2d 669, 672 (Fed. Cir. 1985) (definition of "law enforcement officer" is to be "strictly construed" by the Board); *Morgan v. Office of Personnel Management*, 773 F.2d 282, 286-87 (Fed. Cir. 1985) (statutory term "law enforcement officer" should not be given expansive application). We therefore sustain the agency's decision that the appellants are not entitled to LEO service credit for any period of time that they occupied the GS-083 Police Officer position at the NNB.[6]

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6. Although not argued by the parties, we note that the approach we adopt today is not precluded by precedent of the Federal Circuit. (Cont'd)

Appendix B

ORDER

¶29 For the reasons stated above, we find that the appellants are not entitled to LEO service credit because the GS-05-

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(Cont'd)

In *Bingaman v. Department of the Treasury*, 127 F.3d 1431 (Fed. Cir. 1997), the evidence showed that OPM at first informed Mr. Bingaman that, in view of a Board decision in favor of an employee in *Peek v. Office of Personnel Management*, 63 M.S.P.R. 430 (1994), *aff'd*, 59 F.3d 181 (Fed. Cir. 1995) (Table), he would be given LEO credit to the date he ceased to encumber his position. 127 F.3d at 1438. This would be consistent with the position-oriented approach. OPM subsequently sent Mr. Bingaman a revised letter stating that if he wished LEO credit for the future, he would have to make annual requests for as long as he remained in his position. *Id.* Regarding the revised letter, the court noted an administrative judge's finding that OPM's regulation at 5 C.F.R. § 831.906(e) required Bingaman to make an annual application for LEO retirement credit covering the immediately preceding year. 127 F.3d at 1438.

There is no explanation, other than the reference to the regulation, as to why OPM changed its mind and required Mr. Bingaman to submit yearly requests for LEO credit. The regulation cited by the administrative judge does not require annual requests for LEO service credit; rather, it states that a CSRS employee can receive no more than 1 year's retroactive LEO service credit if he files a late request for such credit, absent a finding by the agency under 5 C.F.R. § 831.906(f) that he was prevented by circumstances beyond his control from making a timely request. The regulation does not require employees in LEO positions to file yearly "accountings" with OPM. The fact that an administrative judge apparently misconstrued a regulation and the court did not need to reach the issue because it denied Mr. Bingaman's request for LEO credit on the merits, provides no basis to reject a position-oriented approach, which is firmly grounded in the language of the statute and OPM's regulations at 5 C.F.R. §§ 831.902 and 842.802.

083 Police Officer position they occupied at the NNB was not created primarily to perform LEO duties as defined by statute. The initial decisions are REVERSED.[7]

¶30 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

* * * *

7. In so finding, we note that individuals who are not parties to these appeals are not precluded in future cases from attempting to show that the basic reason for the creation of the GS-05-083 Police Officer position at the NNB was the performance of LEO duties. *See Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988) (collateral estoppel, or issue preclusion, is appropriate when, among other things, the party precluded was fully represented in the prior action). However, any future appellants who encumber or did encumber this position must show that the position was created as a LEO position, not merely that from time to time they themselves may have performed some LEO duties or that the position "involves," to some extent, LEO duties.